Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY, PETITIONER

v.

CAROLEE BRADY HARTMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a class action may be certified in a sex discrimination case solely on the basis of statistical evidence of sex hiring disparities in the job categories at issue.

2. Whether, by not presenting the argument on a prior interlocutory appeal, the United States Information Agency waived its argument that class members should not have been permitted to intervene as named plaintiffs and class representatives in this case because they had not exhausted their administrative remedies, even though the prior appeal occurred before those new named plaintiffs moved to intervene.

PARTIES TO THE PROCEEDINGS

Petitioner (defendant in the district court and appellant in the court of appeals) is the Director of the United States Information Agency (USIA). Respondents (plaintiffs in the district court and appellees in the court of appeals) are Carolee Brady Hartman, Luba DeMedina, Toura Kem, Rose Kobylinski, Josefa Martinez, Pushpa Agnihotri, Judith Ambrose, Nancy Coffey, Myra Converse, Sonya Davis, Patricia DeYoung, Claire Frankel, Lynn Goldman, Jahanara Hasan, Lisa Heilbronn, Sheila Hoban, Ruthann Irish, Elsa Rael, Honora Rankine-Galloway, Michal Shekel, Yolanda Marshall Tisdale, Carolyn Turner, Shirley Hill Witt, Pamela Woodard, Donna Woolf, and a class of women who applied for employment in non-clerical positions at USIA between October 8, 1974, and November 16, 1984.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Director of the United States Information Agency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals from which review is sought (App. 1a-14a)[1] is reported at 88 F.3d 1232. The opinion of the district court (App. 246a-310a) is reported at 158 F.R.D. 525.

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[1] "App." refers to the separately bound appendix to this petition.

The initial order of the district court conditionally certifying a class action (App. 15a-16a) is unreported. The initial decision of the district court dismissing the case on the merits (App. 12a-34a) is reported at 21 Fair Empl. Prac. Cas. (BNA) 75. The opinion of the court of appeals reversing that dismissal in part and remanding for further proceedings (App. 35a-78a) is reported at 686 F.2d 997.

The decision of the district court on remand finding petitioner liable on the merits (App. 79a-110a) is reported at 600 F. Supp. 361. A subsequent opinion and order of the district court amending the class certification and establishing remedial proceedings (App. 111a-180a) is reported at 678 F. Supp. 312. The order of the district court denying reconsideration of its remedial order (App. 181a-189a) is unreported. A further decision of the district court with regard to remedies (App. 190a-207a) is unreported. The opinion of the court of appeals remanding for reconsideration of the class certification issue (App. 208a-245a) is reported at 19 F.3d 1459.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1996. A petition for rehearing was denied on October 23, 1996. App. 313a-314a. On January 13, 1997, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 1997. On February 12, 1997, the Chief Justice further extended the time within which to file a petition to and including March 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, codified at 42 U.S.C. 2000e-16, prohibits discrimination in employment by the federal government on the basis of race, color, religion, sex, or national origin. That provision is reproduced at App. 315a-319a.

Rule 23 of the Federal Rules of Civil Procedure, regarding class actions, is reproduced at App. 320a-323a.

STATEMENT

This case presents important questions regarding certification and administration of class actions, in the context of a long-running employment discrimination suit against the United States Information Agency (USIA). The district court certified a class of all women who had applied for non-clerical jobs at USIA within a ten-year period. The court of appeals ultimately affirmed that class certification. The court of appeals held first that statistical evidence of sex disparities in hiring is alone sufficient to satisfy the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). The court of appeals also concluded that USIA had waived its argument that 20 named plaintiffs should not have been permitted to intervene as class representatives because, on a prior interlocutory appeal (which had occurred before the new named plaintiffs had even moved to intervene), USIA had not raised the issue.

1. This action was filed in 1977 by respondent Carolee Brady Hartman, who sought to represent a class of women who had either applied to or worked

for USIA, and who claimed to have been adversely affected by USIA's employment practices concerning hiring and promotion. App. 18a. In 1978, the district court certified a class of "all women who have applied for employment with or who are currently employed by the [USIA] and who have been or continue to be adversely affected by the discriminatory employment practices of the defendant." App. 16a. USIA employs people in both civil service and foreign service positions, and the certified class included applicants for both kinds of positions.

In October 1979, after a bench trial, the district court amended the class to include only women who had applied for or were currently employed in non-clerical positions at USIA. App. 25a-26a. The court also dismissed the suit for failure to establish a prima facie case of discrimination. App. 32a. In dismissing the case, the district court rejected both parties' statistical evidence and concluded that respondents' evidence of individual instances of discrimination was not persuasive. *Ibid.*

The court of appeals reversed in part. App. 35a-78a. It affirmed the dismissal of the promotion discrimination claims. App. 65a-66a. It concluded, however, that the district court had held respondents to too high a standard in evaluating their statistical evidence. In particular, it held that the district court had defined too narrowly the relevant labor pool in the general population to be used for comparison purposes in order to show sex hiring disparities in particular job categories at USIA. App. 41a-64a.[2]

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[2] The court of appeals also affirmed the district court's dismissal of one individual claim that had been consolidated with the class action, and reversed the dismissal of another

2. On remand, the district court found, on the basis of the existing record, that statistical disparities established a prima facie case of discrimination in hiring in six USIA job categories: electronic technician, foreign language broadcaster, production specialist, writer/editor, foreign information specialist, and radio broadcast technician. Those positions comprised about 50% of USIA's workforce. App. 97a. Concluding that USIA's statistics failed to rebut the plaintiffs' prima facie case, the district court found USIA liable for discrimination in hiring in those six categories. App. 109a.[3]

The district court subsequently held a remedial trial and issued a decision establishing remedial procedures. The court first narrowed the class to include only women who had applied for one of the specific six positions at issue in the suit between October 8, 1974, and November 16, 1984. App. 127a-134a. The court then held that, as to applicants for civil service positions, a special master would hold so-called *Teamsters* hearings, in which purported class members would be allowed to establish their entitlement to relief by showing that they had unsuccessfully applied for the positions (the burden would then shift to USIA to show that the class member had been denied a position for lawful reasons). App. 149a-153a; see generally *International Bhd. of*

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individual claim on exhaustion grounds. App. 67a-73a. The court of appeals remanded for further findings on class claims of retaliation, which had been included in a supplemental complaint. App. 66a.

[3] The district court also found that USIA had unlawfully discriminated against one of the individual named plaintiffs in failing to hire her, App. 80a-86a, and dismissed the class claim of retaliation, App. 86a-93a.

Teamsters v. *United States*, 431 U.S. 324, 372 (1977). Applicants for certain foreign service positions were to be ranked according to their scores on the written portion of the foreign service exam and then invited, in descending order of their examination scores, to sit for the oral portion of the exam. App. 160a-164a.[4]

3. USIA then took an interlocutory appeal under 28 U.S.C. 1292(a)(1) on several issues, including the propriety of the class certification, the liability ruling, and the scope of the remedy. On that appeal, USIA challenged the district court's class certification, contending that the individual plaintiffs had not shown, as required by Federal Rule of Civil Procedure 23, that their claims were typical of those of the class, or that the case presented common questions of law or fact.[5] The court of appeals remanded for further proceedings, concluding that the district court had not made findings sufficient to sustain the class certification decision or to permit appellate review of that decision. App. 232a-245a.

The court of appeals noted that, although the district court had narrowed the class it had originally certified by excluding persons who had applied for clerical positions, respondents were still required "to demonstrate the requisite commonality and typicality in order to maintain the suit as a class action." App. 234a. The court pointed out that, under *General*

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[4] In a subsequent remedial decision, the district court ordered USIA to set aside 39 foreign service positions, to be filled with class members over the course of three years. App. 205a. The court of appeals found that number to be excessive, and remanded the matter for further consideration. App. 13a-14a.

[5] USIA also challenged the district court's finding of liability and contended that the number of positions set aside for foreign service applicants was excessive.

Telephone Co. v. *Falcon*, 457 U.S. 147 (1982), "there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of membership in a particular group." App. 238a. Where a proposed class cuts across job categories, the court explained, "plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." App. 239a.

The court of appeals found that, "[w]hile [respondents'] statistics may have demonstrated that discrimination against women applicants to the six USIA job categories was afoot, nothing in the record so far permits the additional inference that class members suffered a *common* injury." App. 238a. The court also stated that "[t]he lack of a specific foundation for treating women applicants to USIA as a class *a fortiori* undermines the further effort to branch out and include foreign service officers in the plaintiff class." App. 240a. The court noted that, at the liability trial, the district court did not differentiate between civil and foreign service officers in determining that USIA had discriminated in the six job categories. It also observed that the finding of liability "was based solely on an unrebutted *prima facie* case made out by statistics," and it cautioned that, "[w]hile statistics can generally be probative of the question of commonality, we would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality." App. 241a.

The court of appeals directed the district court on remand to "conduct a more rigorous inquiry into commonality and typicality." App. 243a. It instructed

the district court to determine whether the class had been properly certified in 1978, and, even if certification had not been proper in 1978, also to consider whether certification was nevertheless appropriate after the liability trial. With regard to the latter point, the court of appeals cautioned the district court to exclude from consideration any evidence "that *could only* have been developed *as a result* of the initial (improper) decision to certify the class." App. 244a. The court believed that the use of such flawed evidence to support the post-trial certification was not likely to be a problem, however, because (the court stated) USIA's "principal challenge" was that the statistics presented at trial were the outgrowth of an improper certification, and the court "[did] not expect the district court to rely solely on the trial statistics in its reevaluation of the propriety of class certification." *Ibid.* The court observed further that among the options available to the district court on remand were "creating sub-classes, certifying a narrower class, or adding additional class representatives." *Ibid.*

4. On the second remand, the district court allowed 20 members of the class to intervene as named plaintiffs and class representatives. In doing so, it rejected USIA's contentions that the intervenors were not proper class representatives because they had failed to exhaust their administrative remedies, and because their claims were defective on the merits. App. 250a-263a. With regard to the exhaustion point, the district court relied on court of appeals cases applying the doctrine of "vicarious exhaustion" to conclude that the intervenors' claims were sufficiently similar to respondent Hartman's claim to

make individual exhaustion by the intervenors unnecessary. App. 259a-263a.

The district court then reaffirmed its decision to certify the class. It concluded first that its decision in 1978 to certify the class was correct. App. 268a-270a. It also held that its certification of the class was proper as of the record compiled by 1994, specifically including the testimony of the new intervenors about the discrimination they had allegedly suffered. App. 270a-291a.

With regard to the initial 1978 certification, the district court found that existence of commonality and typicality was supported by evidence of "numerous subjective and discriminatory practices," including "the use of overt sexist comments in denying positions to females, preferences for males in full time jobs at USIA, the subjective application of hiring criteria, unfair testing procedures, active discouragement of females from pursuing jobs at the USIA, concealment of vacancies by hiring officials from qualified females, and the preselection of male candidates for positions sought by women." App. 269a-270a. As to whether a class might be certified properly in 1994, the court found that respondents had identified four discriminatory practices that cut across all six job categories in which it had found discrimination, including foreign service positions. Those practices were: "(1) overt discrimination and express limitations on the employment of women; (2) disparate application of subjective criteria to deny women positions, including biased evaluations of tests and credentials; (3) discouragement of female applicants, including the failure to respond to their applications; and (4) the use of discriminatory recruitment devices, including

preselection of men, to avoid hiring qualified women." App. 271a.

5. USIA then took another appeal, again challenging the district court's class certification decision, as well as its ruling permitting intervention, its liability determination, and the scope of the remedy. The court of appeals affirmed the district court as relevant here, with regard to class certification and intervention. App. 4a-6a, 8a-9a.

a. With regard to the intervention, the court of appeals *sua sponte* determined that USIA had waived its argument that the new named plaintiffs should not have been permitted to intervene, by failing to raise any challenge to those plaintiffs' status as class members on the prior interlocutory appeal. App. 5a-6a. The court noted that USIA had argued to the district court that the 20 class members should not be permitted to intervene as additional named plaintiffs because they had failed to exhaust their administrative remedies. App. 4a. It also stated that, on the appeal before it, USIA disputed the district court's application of the vicarious exhaustion doctrine, "claiming among other things that the few administrative complaints actually filed [by the original named plaintiffs] were not precise enough to fulfill the purposes of the [vicarious exhaustion] doctrine, such as putting the agency on notice and allowing for administrative resolution of the claims." App. 4a-5a.

The court declined to reach USIA's challenge to the district court's application of the vicarious exhaustion doctrine, for it concluded that USIA had had "ample opportunity" to raise the exhaustion issue on its prior appeal. App. 5a. The court stated that USIA's "theory here depends simply on the absence of individual exhaustion and on the vagueness of the

administrative complaints of those who did exhaust." *Ibid.* But, the court noted, "the vast majority of the members of the class have not exhausted their administrative remedies (and the intervenors are and have always been members of the class)." *Ibid.* Therefore, according to the court, "the filing of petitions for intervention as named plaintiffs did nothing to enhance [USIA's] ability to raise the issue of exhaustion by plaintiffs who * * * failed to exhaust their remedies personally." *Ibid.* The court therefore found that USIA had waived its right to challenge intervention, even though respondents did not raise the waiver issue.

b. The court also affirmed the district court's certification of the class. The court noted that the district court had identified "four 'practices' evidencing a common policy of discrimination that largely cut across job categories," and that USIA had contended that "these supposed 'practices' amount simply to anecdotal evidence of subjective discrimination." App. 9a. The court determined, however, that it need not address USIA's challenge to the evidence actually relied on by the district court to support class certification, because the statistical evidence of sex disparity in hiring presented at trial was alone sufficient to support class certification. See *ibid.*

The court acknowledged that, in its prior decision, it had "hesitated to suggest that the certification finding might be based on statistical evidence alone." App. 9a. It reasoned, however, that its earlier doubts about the use of statistical evidence to support class certification had been based on concern that the statistical evidence itself "might have been 'premised on the (improper) class certification [in 1978],' a concern that appears to have been significantly driven

by [respondents'] blurring of lines between the civil service and the foreign service." *Ibid.* (citation omitted). But, the court of appeals ruled, since USIA no longer challenged the inclusion of civil service and foreign service applicants in a single class, "and with [USIA] making no argument as to why the statistical evidence would not have been admissible in trials of individual cases brought on behalf of *any* particular class member, the case no longer appears to present any reason for that concern." *Ibid.* Accordingly, the court found no abuse of discretion in the certification of the class.[6]

REASONS FOR GRANTING THE PETITION

The court of appeals has issued two important decisions regarding the certification and administration of class actions in the context of employment discrimination cases. Both of those decisions are erroneous, and both have broad implications for class

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[6] The court of appeals affirmed the finding of classwide liability, concluding that USIA had waived its challenges to the statistical evidence on which the district court's liability finding was based. App. 10a-13a. The court also rejected USIA's argument that, in light of the allegations by the intervenors of discriminatory practices at USIA, the district court should have permitted further discovery and an opportunity for USIA to rebut those allegations before ruling on liability. According to the court, the new evidence presented by the intervenors did not go to the issue of liability but rather only to the issue of class certification. App. 12a-13a.

The court of appeals also concluded that the district court had improperly computed the number of foreign service positions to be set aside for class members, App. 13a-14a, and had improperly disregarded its own earlier finding against Hartman on her individual discrimination claim, which appeared to be law of the case, App. 6a-8a. The court remanded both issues for further consideration by the district court.

actions generally and for class actions against the government specifically. Review by this Court is therefore warranted.

The court of appeals first concluded that the commonality and typicality requirements for an employment-discrimination class action may be satisfied *solely* by statistical evidence of hiring disparities in the job categories at issue, without any comparison of the specific allegations of the named plaintiffs to the discriminatory practices that are alleged to have been suffered by the other, unnamed members of the purported class. That conclusion is inconsistent with this Court's decision in *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), which held that, to maintain an employment-discrimination suit as a class action, plaintiffs must allege specific, identifiable discriminatory practices by the employer commonly affecting the members of the class. Statistics of sex disparities in hiring, which the court of appeals concluded were sufficient to support class certification here, shed no light on whether such disparities are the result of one or more common practices affecting the class as a whole. The court of appeals' decision ignores the teaching of *Falcon* and, in essence, permits employment-discrimination suits to proceed as class actions where the putative class members have nothing in common except (a) a broad job category to which they applied and (b) some allegation of discrimination on the basis of a shared attribute—race, color, religion, sex, or national origin—that is covered by Title VII. Absent is any requirement that plaintiffs show that an identifiable discriminatory practice (or practices) were applied to the class as a whole.

The court of appeals' holding on intervention also misapprehends class action principles and undermines the utility of class actions as an efficient method of resolving disputes. The court held that USIA had waived its arguments against intervention by individual class members who had not exhausted their administrative remedies because it had not raised its exhaustion arguments on a prior interlocutory appeal. That conclusion, however, is quite erroneous, for USIA had no reason to raise the class members' failure to exhaust their administrative remedies until they sought to intervene as named plaintiffs and class representatives. And the consequence of the court of appeals' waiver ruling is that class-action defendants must scrutinize and contest the claims of every absent class member at the outset of the case, since any one of those absent class members might seek to become a class representative at some later stage in the litigation.

The court of appeals' decision, if left unreviewed, would have a particularly profound impact on class-action litigation against the federal government. Because the District of Columbia is the seat of government, venue lies in the United States District Court for the District of Columbia for most employment-discrimination class actions against federal agencies. Accordingly, it is to be expected that plaintiffs filing employment-discrimination class actions against federal agencies will seek to take advantage of the D.C. Circuit's erroneous rulings by filing suit in that district. Thus, even though the court of appeals' rulings are so unprecedented that we

cannot point to a conflict with the decisions of other circuits, those rulings warrant review by this Court.[7]

1. a. Federal Rule of Civil Procedure 23(a) requires, as "[p]rerequisites to a [c]lass [a]ction," that the class representatives show that "there are questions of law or fact common to the class," and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2) and (3). In two decisions, this Court has made clear that an employment-discrimination class action may be certified under Rule 23 only when a rigorous analysis of the relevant claims reveals that the named plaintiffs' discrimination claims and those of the class actually share

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[7] The court of appeals' reliance on statistical evidence alone to support class certification is, however, in tension with the decision of the Eighth Circuit in *Chaffin* v. *Rheem Manufacturing Co.*, 904 F.2d 1269 (1990). In *Rheem*, the court affirmed the denial of class certification in a Title VII case because the individual named plaintiff, who claimed racial discrimination in promotions, could point to only one or two other black employees who might have been discriminated against in promotions, and otherwise relied on statistical evidence, which the district court had found to be "bareboned." *Id.* at 1276. Relying on *Falcon*, the court of appeals agreed with the district court's conclusion that the plaintiff's claims of disparate treatment "were primarily claims of racial discrimination individual to him and, as such, did not support a class action." *Ibid.* District courts have also been skeptical of relying on statistical evidence to support class certification, and have noted that *Falcon* requires evidence that the employer applied a discriminatory practice to the class. See, *e.g.*, *Churchill* v. *IBM, Inc.*, 759 F. Supp. 1089, 1101 (D.N.J. 1991); *Ross* v. *Nikko Sec. Co.*, 133 F.R.D. 96, 96-97 (S.D.N.Y. 1990); *Price* v. *Cannon Mills*, 113 F.R.D. 66, 71 (M.D.N.C. 1986); *Sheehan* v. *Purolator, Inc.*, 103 F.R.D. 641, 648-649 (E.D.N.Y. 1984), aff'd, 839 F.2d 99 (2d Cir.), cert. denied, 488 U.S. 891 (1988).

specific, common issues of fact or law, and that the named plaintiffs' specific claims are typical of those of the class. The court of appeals' ruling that a class action may be certified on statistical evidence alone departs from this Court's rulings.

In *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), the Court reversed a decision by the Fifth Circuit certifying a class in a Title VII case despite district court findings, left undisturbed on appeal, that the class representatives were unqualified for the positions allegedly denied to them on the basis of race and national origin. This Court emphasized that at the time of certification, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 403 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). The Court observed that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs," but it stressed that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." 431 U.S. at 405.

Subsequently, in *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), the Court disapproved the use of so-called "across-the-board" class actions, in which named plaintiffs purported to represent the class of persons who were alleged to be affected by all the unequal employment practices allegedly committed by an employer pursuant to a policy of racial discrimination. See *id.* at 152, 157. In that case, the named plaintiff, a Mexican-American who alleged that his employer had discriminated against him in hiring and promotion on the basis of his national origin, purported to represent a class of all Mexican-American

employees and all Mexican-American applicants for employment who had not been hired. The district court held that the plaintiff had suffered discrimination in promotion but not in hiring, and reached converse conclusions about the class. *Id.* at 152. The district court's findings on classwide liability were based largely on statistical evidence of hiring disparity. See *id.* at 159.

This Court held that the named plaintiff was not an appropriate representative for the class of Mexican-American applicants for employment that the employer did not hire. The Court held, in particular, that a plaintiff who alleges discrimination in *promotion* cannot be presumed to qualify as a class representative for persons of similar national origin aggrieved by the employer's *initial hiring* practices. 457 U.S. at 158-159. The Court stressed that, "[c]onceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual." *Id.* at 157. And the Court concluded that, "to bridge that gap," a named plaintiff who alleges discrimination in an array of employment practices must show not only that the discriminatory treatment he experienced was typical of the employer's promotion practices, but also that the employer's policy of discrimination was "reflected in [the employer's] other employment practices, such as hiring, *in the same way* it is manifested in the promotion practices." *Id.* at 157-158 (emphasis added). The Court required a "specific presentation identifying the questions of law or fact that were common to the

claims of respondent and of the members of the class he sought to represent." *Ibid.*[8]

The Court further noted in *Falcon* that, as might be expected, the plaintiff had attempted to prove his individual claim through direct proof of intentional discrimination and the class claims through statistical evidence of disparate impact. 457 U.S. at 159. Given the gap between the proofs on the individual claim and the class claims, the Court observed that the two claims "might as well have been tried separately." *Ibid.* In that situation, the Court concluded, there was little benefit in the nature of efficient and economical litigation to allow the plaintiff to represent a class of persons who had allegedly suffered from an entirely different discriminatory practice. *Ibid.* And the Court reemphasized that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.

b. The court of appeals' decision, sustaining the class action in this case on the basis of statistical evidence alone, departs from the Court's decisions in *Rodriguez* and *Falcon*. Whatever the relevance of

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[8] The Court noted that, in some circumstances, the same discriminatory policy might manifest itself in both hiring and promotion decisions—as where the employer uses a biased testing procedure in both contexts, or where there is "[s]ignificant proof that an employer operated under a general policy of discrimination * * * if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n.15. But, the Court emphasized, "it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination." *Ibid.*

the statistical evidence on the merits to show sex disparities in employment practices at USIA, that evidence does not show anything in the nature of commonality or typicality—it does not demonstrate any relation between the practices alleged to have affected named plaintiffs and the practices allegedly visited upon the class as a whole.

In its decision on USIA's first appeal, the court of appeals held that the district court's initial class certification was not based on the "rigorous inquiry" into commonality and typicality required by *Falcon*. App. 243a. The court of appeals noted specifically that, "[w]hile [respondents'] statistics may have demonstrated that discrimination against women applicants to the six USIA job categories was afoot, nothing in the record so far permits the additional inference that class members suffered a *common* injury." App. 238a. The court further observed that "we do not expect the district court to rely solely on the trial statistics in its reevaluation of the propriety of class certification." App. 244a.

On remand, the district court attempted to implement the court of appeals' instructions by identifying four hiring "practices" that, it found, cut across the six job categories in which it had already found liability for discrimination. In concluding that respondents had met their burden under Rule 23, the district court relied exclusively on anecdotal evidence presented by individual members of the class before, during, and after the liability trial. It did not rely on the statistical evidence of hiring disparities in the trial record. Indeed, characterizing the instructions it had received on remand, the district court stated that "[t]he Court of Appeals made clear that this

Court cannot rely on trial statistics to * * * certify the class." App. 270a.

In the subsequent appeal, USIA argued that the four "practices" identified by the district court were individual anecdotes without a common pattern and did not establish commonality and typicality as required under both *Falcon* and the court of appeals' prior opinion. The court of appeals acknowledged but declined to address that argument. Instead, the court of appeals concluded that it could uphold the class certification on the basis of the trial statistics alone —even though the district court had not relied on those statistics *at all* in making its certification decision. See App. 9a, 270a.

By relying solely on the statistical evidence of hiring disparities presented at trial, the court of appeals made a fundamental error. As the description of that evidence in the district court's liability decision makes clear, the trial statistics simply compare the numbers of women employed by USIA in its major non-clerical job categories with the numbers of women who would be expected to be employed in those categories based on their availability in the relevant labor market. App. 98a. While that statistical evidence may be relevant to an ultimate finding as to whether there was discrimination in any particular job category, it says nothing as to *how* any discrimination was manifested with respect to any particular position—that is, the particular discriminatory practices that may have been used. Nor does it say anything as to whether the discriminatory practices alleged to have affected the named plaintiffs also affected any other members of the class. Without specific evidence demonstrating that the discriminatory practice allegedly suffered by the class repre-

sentatives is the *same* practice as that alleged to have resulted in classwide discrimination, there is no more connection between the named plaintiffs' claims and the class claims here than there was between the two in *Falcon*, where the finding of classwide liability was also based on statistical evidence of hiring disparities. See 457 U.S. at 159.

Respondents' statistical evidence of hiring disparities therefore cannot provide a basis for the finding, deemed essential to class certification by this Court in *Rodriguez* and *Falcon*, that the same employment practices affected the class as well as the named plaintiffs. Such a finding depends on evidence that describes or permits a finding of particular employer conduct (or perhaps a comprehensive employer policy of discrimination that was manifested in a particular fashion, see *Falcon*, 457 U.S. at 159 n.15). To rely, as the court of appeals did here, solely on statistical evidence of disparities in hiring, promotion, or other aspects of employment to support class certification is to ignore Rule 23's requirement of a *common* employment practice affecting the class.

Contrary to the court of appeals' suggestion (App. 9a), the inadequacy of the trial statistics as a foundation for the findings of commonality and typicality required by Rule 23 goes beyond the statistics' failure to distinguish between civil service and foreign service positions, which the court of appeals had emphasized in its opinion in USIA's first appeal (see App. 240a-242a). The statistics—which simply point to disparities in employment of men and women in USIA job categories at certain "snapshot" points—are unrevealing about any specific employment practices that might have caused disparities in the representation of women in the USIA workforce, let

alone whether those practices extended across the full range of positions covered by the district court's class certification. The court of appeals therefore erred in concluding (App. 8a-9a) that, because USIA did not specifically address the civil service/foreign service distinction in its arguments against the "common practices" identified by the district court on remand, the court of appeals was free to disregard those arguments and affirm the certification on the basis of the statistical evidence alone.

2. The court of appeals also erred in concluding—*sua sponte*, and without the benefit of briefing on the point—that USIA had waived its right to challenge intervention as named plaintiffs and class representatives by 20 individuals who had previously been merely absent members of the class. In the courts below, USIA contended, among other things, that those 20 individuals should not be permitted to intervene because they had not exhausted their administrative remedies.[9] The court of appeals concluded, however, that USIA had waived its right to present that challenge because USIA knew at the time of its

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[9] It is well established that exhaustion is a prerequisite to filing suit alleging employment discrimination under Title VII. *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976). During the relevant period, regulations of the Equal Employment Opportunity Commission required an aggrieved government employee to contact an agency equal employment opportunity counselor within 30 days of the alleged discriminatory incident. 29 C.F.R. 1613.213(a), 1613.214(a)(1)(i) (1995). If the counselor was unable to resolve the complaint informally, the employee had 15 days from his final interview with the counselor to file a formal complaint with the agency. 29 C.F.R. 1613.213(a), 1613.214(a)(1)(ii) (1995). Current regulations give the employee 45 days from the alleged discrimination to initiate the informal conciliation process. See 29 C.F.R. 1614.105(a)(1).

first appeal that some members of the class had not exhausted their administrative remedies personally. Thus, according to the court, the filing of the petition for intervention naming 20 new class representatives "did nothing to enhance [USIA's] ability to raise the issue of exhaustion." App. 5a.

The court of appeals' conclusion is erroneous on two counts. First, before the 20 class members filed their petition for intervention, there was no reason for USIA to raise the issue of their failure to exhaust their administrative remedies. Before the petition for intervention was filed, whether any *individual* absent member of the class had suffered discrimination and was entitled to relief had no direct bearing on the issue of *classwide* liability. Cf. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 877-878 (1984) (class members may pursue individual claims for discrimination, even if court has found that employer did not engage in classwide discrimination). Those 20 class members sought to intervene for the purpose of establishing an evidentiary foundation for the element of typicality necessary to support a class action: Rule 23(a) requires that "the claims * * * of the *representative parties* [be] typical of the claims * * * of the class" (emphasis added). Without the additional evidence presented by those intervenors, respondents' evidence of typicality was considerably weaker. Thus, only after the petition for intervention was filed did the intervenors' failure to exhaust gain any relevance to the maintenance of the class action.[10]

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[10] The individual class members' failure to exhaust their remedies would be relevant to the individual *Teamsters* remedial hearings, in which class members may establish their entitlement to individual relief after the court has found that

Second, before the petition for intervention was filed, USIA had no basis for determining whether the individual intervenors' claims were sufficiently similar to those of the class members who did personally exhaust their remedies to permit those intervenors to rely on the doctrine of "vicarious exhaustion." In *Foster* v. *Gueory*, 655 F.2d 1319 (D.C. Cir. 1981), the case cited by the court of appeals for the proposition that "exhaustion of administrative remedies by one member of the class satisfies the requirement for all others with sufficiently similar grievances" (App. 4a), the court held that persons seeking to intervene as additional named plaintiffs in an employment discrimination case should not be denied intervention on the ground of failure to exhaust when the claims of the original plaintiffs and those of the intervenors "are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges." 655 F.2d at 1322. Thus, whether an individual plaintiff who seeks to intervene as a class representative can escape the exhaustion requirement depends upon an analysis that can only be performed once the proposed intervenor steps forward and articulates her claim.

Under the court of appeals' rule, however, a class-action defendant would have to take discovery, at the earliest opportunity, of class members who are *not* named plaintiffs and representative parties to determine whether those absent class members' claims could satisfy the vicarious exhaustion rule; otherwise, class members could wait until a very late

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the employer discriminated against a class. Their failure to exhaust had no direct relevance to the issue of classwide liability, however, until they sought to intervene.

stage of the litigation to intervene, at which point the defendant could do little to challenge their suitability as intervenors. That result effectively turns settled class action law on its head. The courts have held that nonrepresentative plaintiffs are not "parties" for purposes of discovery, see *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 562 n.1 (E.D.N.Y. 1985), and that absent class members should not routinely be required to submit to discovery. *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972); *United States* v. *Trucking Employers, Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976); *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 212 (M.D. Fla. 1993); *Transamerican Refining Corp.* v. *Dravo Corp.*, 139 F.R.D. 619, 621 (S.D. Tex. 1991). As the court explained in *Wainwright* v. *Kraft Co.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972): "The usefulness of Rule 23 would end if class members could be subjected to [the discovery rules] and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories." To require an agency to inquire into the specifics of each class member at the outset of the litigation, because 15 years later a class member might seek to become a class representative, could seriously undermine the usefulness of the action vehicle. Cf. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553-554 (1974).

3. The decision of the court of appeals warrants review because of its broad implications for class action litigation. The court of appeals' reliance on statistics alone to support certification of a broad class (here, cutting across half the positions at USIA) significantly lightens plaintiffs' burden of demonstrating that a class action is appropriate and undermines this Court's instruction that a "rigorous

analysis" of typicality and commonality is necessary for certification under Rule 23. The intervention ruling makes it incumbent on class action defendants to engage in discovery of unnamed class members, in contravention of settled law. Both rulings have particular significance because of the federal government's amenability to suit in the District of Columbia. Accordingly, even in the absence of an explicit conflict among the courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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